Supreme Court, U.S.
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No. 94-1557

IN THE

Supreme Court Of The United States

October Term, 1994

HERCULES INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF HERCULES INCORPORATED TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were as follows:

(1) Appellant Hercules Incorporated has no parent company and has no subsidiaries or affiliates that are publicly traded;

(2) Appellee The United States of America;

(3) Appellant Arkansas Department of Pollution Control and Ecology;

(4) Appellant Vertac Chemical Corporation (no parent and no publicly traded subsidiaries or affiliates);

(5) Appellant Uniroyal Chemical Company, Ltd. (Parent Uniroyal Chemical Company, Inc.).

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CORRECTED STATEMENT OF FACTS

While irrelevant to the issues raised in Hercules' petition, there are factual errors in the United States' Brief in Opposition. These could lead to an erroneous impression of the relationship between the United States and Hercules in the production of Agent Orange. These errors need to be corrected.

The government incorrectly suggests (Op. 4) that Hercules competitively bid for all Agent Orange contracts. Nothing in the record supports that assertion. In fact, Hercules was forced to accept rated contracts, and its request for relief from the government's demands were rejected. (JA, Tab 19, ¶¶ 104, 105). *See also Hercules Incorporated v. United States*, 24 F.3d 188, 202 (Fed. Cir. 1994).

The government also incorrectly asserts that Hercules was able to produce herbicides for the commercial market during the entire course of its Agent Orange production. In fact, the government ordered that all of the commercial capacity for producing 2,4,5-T *in the country* be devoted to the production of Agent Orange. (JA, Tab 19, ¶¶ 80-81). After the government's 1967 directive Hercules was required to devote its entire production capacity (both 2, 4-D and 2, 4, 5-T) to Agent Orange production. (JA, Tab 19, ¶¶ 102-05). Indeed, also contrary to the government's assertion, Hercules was required to expand its production capacity to meet the government's requirements and to obtain additional equipment, through the use of rated orders, to enable it to do so. (FA, Tab 19, ¶¶ 100-01, 115.)

ARGUMENT

Earlier this term this Court decided to consider a case which places at issue the government's obligation to protect its contractors from products liability claims relating to strategically important products that the government compels manufacturers to produce. In that case, *Hercules Incorporated and Wm. T. Thompson Company v. United States of America*, Case No.

94-818, contractors which manufactured Agent Orange to the government's specifications during the Vietnam War in compliance with the government's mandatory orders issued under the authority of the Defense Production Act[1] incurred liability to servicemen who claimed to have been injured by exposure to Agent Orange. In this case, one of those Agent Orange contractors, Hercules Incorporated ("Hercules"), has incurred environmental liability as a result of complying with the same unrefusable orders.

This case complements case Number 94-818. Hercules competently and properly carried out the government's orders, but still incurred substantial liability by doing so. Public policy, clearly articulated by Congress in the Defense Production Act, demands that the government protect its contractors from these hidden penalties which may result from complying with the government's mandatory orders.

Amazingly, the government, after having sought a decision on the merits of Hercules' Defense Production Act claims and defenses in the district court, without objecting to the district court's jurisdiction; after having successfully sought to affirm the district court's decision on the merits in the court of appeals; and while now urging the Court to deny Hercules' petition (which would leave the court of appeals' decision on the merits in place) now, for the first time, argues that the district court never had jurisdiction in the first place. As shown below, the district court had jurisdiction to decide Hercules' counterclaim. If the government were correct that the district court did not have jurisdiction, however, that would require this Court to grant the petition, or, at least, to vacate and remand the court of appeals decision. A denial of the petition would leave in place decisions by the district court and court of appeals on the merits of Hercules' counterclaims that, according to the government, those courts had no jurisdiction to decide.

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[1] 50 U.S.C. app. §§ 2061, *et seq.*

Since, as the United States concedes, the Court's decision in Case Number 94-818 "might well shed light on the legal merit of the DPA indemnity claim," (Op. 19), this case at the least should be held for decision pending a resolution of that case. The courts below will need the Court's guidance on the Defense Production Act issues raised in that case.

If, however, the Court is inclined to give credence to the government's new suggestion that the district court and court of appeals did not have jurisdiction to decide the Defense Production Act claim, the decisions below should be vacated and the case remanded.

This case also presents important issues concerning liability for environmental clean-up costs under CERCLA[2] that merit this Court's review to resolve conflicts in the district courts and courts of appeals as to those issues.

Defense Production Act protection

When the government uses its power to require a contractor to manufacture a product for it for use in wartime, it has an obligation to hold that contractor harmless for the consequences of that production in compliance with the government's orders, whatever those consequences are.

That public policy is embodied in section 707 of the Defense Production Act.[3] As applied to this case, that public policy would require the United States to be held liable for all environmental response costs at the Vertac Site that are attributable to Agent Orange production that Hercules undertook pursuant to mandatory rated orders issued by the United States.

The ruling that Hercules seeks under the Defense Production Act in this case would affect relatively few contractors who share the unusual historical circumstances in which Hercules

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[2] CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

[3] 50 U.S.C. app. § 2157.

finds itself. Only contractors: (1) who were ordered to produce goods under rated orders or directives pursuant to the Defense Production Act; and (2) whose production of those goods inherently would lead to CERCLA liability and (3) whose facilities are no longer used for production for the government[4] would be affected.

As noted above, the government cites 28 U.S.C, §§ 1491 (a)(1) and 1346(a)(2) for the proposition that the United States Court of Federal Claims has exclusive jurisdiction over Hercules' counterclaim. Those sections only apply when a claimant seeks affirmative relief from the government, however. In this case Hercules seeks an apportionment of the responsibility for clean-up costs with the government. The relief Hercules seeks is therefore in the nature of a counterclaim for recoupment or set-off against the government, over which district courts have jurisdiction. *See U.S. v. Moore*, 703 F. Supp. 455 (E.D. Va. 1988); *FDIC v. Hulsey*, 22 F.3d 1472 (10th Cir. 1994); *U.S. v. Holder*, 292 F. Supp. 826 (S.D. Iowa 1968); *U.S. v. Summ*, 282 F. Supp. 628 (D. N.J. 1968). There is no jurisdictional bar to the Court's granting Hercules' petition and deciding this issue on the merits.

If the Court is inclined to disagree, however, the remedy is not, as the government asserts, a denial of Hercules' petition. That would leave in place district court and court of appeals decisions on the merits of Hercules' claim that those courts had no jurisdiction to render. Instead, the proper remedy would be for the Court to grant Hercules' petition, vacate the court of appeals and district court decisions as to Hercules' Defense Production Act claim, and remand the case to the court of appeals. There is no need for the Court to take such action now,

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[4] The Department of Defense routinely has allowed contractors to charge the costs of environmental cleanups -- even clean-ups for historical contamination -- as overhead in ongoing government contracts that are performed at such sites.

however, in light of the pendency of Case 94-818. This case can be held for decision pending the decision in Case Number 94-818.

CERCLA liability

Few areas of the law are as unsettled as the standards of liability for environmental response costs under CERCLA. The United States cannot reasonably deny that conflicts among courts attempting to construe the CERCLA provisions imposing "operator" and "arranger" liability abound. The Eighth Circuit in this case recognized the conflicts in decisions interpreting the standards for "operator" liability. The cases that Hercules cited in its petition reflect similar conflicts among courts which have attempted to interpret the standards for "arranger" liability.

The conflicts in court decisions on operator and arranger liability deprive parties who are accused of being liable parties under CERCLA the predictability of application of the law that they must have to guide their actions.

CONCLUSION

This Court has already decided to consider the United States' duty to protect those contractors from liability that they may incur by carrying out orders from the government that they cannot lawfully refuse. The Court's decision in Case Number 94-818 will influence the resolution of this case, as well. This case should be held pending a resolution of case Number 94-818. The other issues that merit this Court's attention, including a resolution of conflicting CERCLA liability decisions, can then be considered in light of the resolution of Case Number 94-818.

There is no jurisdictional impediment to the Court's deciding the merits of Hercules' Defense Production Act claim in the present posture of this case, but if there were, that impediment would require the decisions below to be vacated as having been rendered without jurisdiction.

Hercules respectfully urges the court to grant its petition for a writ of certiorari, or, alternatively, to hold this case for resolution of the Defense Production Act issues that have been raised in Case Number 94-818, or to vacate and remand for lack of subject matter jurisdiction in the courts below.

Respectfully submitted,
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